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No. 84-685

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD NIXON RUSH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the defense preparation period provision of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), required that petitioners Harry and Jacob Shnurman be afforded a new 30-day defense preparation period following a substitution of counsel.

2. Whether the pendency of the government's petition for rehearing seeking reconsideration of the court of appeals' affirmance of the dismissal of charges against one of petitioners' co-defendants tolled the time limits for trial for petitioners under the Speedy Trial Act.

3. Whether petitioners should have been permitted to raise a "religious exemption" defense to the charge of possession with intent to distribute 21 tons of marijuana.

4. Whether the district court abused its discretion in failing to sever petitioners into two groups for separate trials.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-63) is reported at 738 F.2d 497.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1984, and petitions for rehearing were denied on July 26, 1984 (see Pet. App. 65-69). The petition for a writ of certiorari was filed on October 23, 1984, and is therefore out of time under Rule 20.1 of the Rules of this Court.

STATEMENT

Following a jury trial in the United States District Court for the District of Maine, 14 of the 15 petitioners were convicted of possessing with intent to distribute 21 tons of marijuana (Count II), in violation of 21 U.S.C. 841(a)(1) and (b)(6), and six of the petitioners were convicted of conspiracy to commit the substantive offense (Count I), in violation of 21 U.S.C. 846.[1] They were sentenced as follows: Rush and Harry Shnurman to five years' imprisonment to be followed by three years' special parole; Leaton, Risolvato, Cohen, Converse, Olsen, Johnson and Gregory Lancelotti to five years' imprisonment to be followed by two years' special parole; Nissenbaum to five years' imprisonment; Larry Lancelotti to six and a half years' imprisonment; Brown to six years and nine months' imprisonment to be followed by four years' special parole; Imoberstag and Collins to eight years and eight months' imprisonment, to be followed by four years' special parole; Jacob Shnurman to nine and a half years' imprisonment to be followed by four years' special parole.

1. The evidence at trial showed that in the spring of 1980 petitioner Nissenbaum bought two 20-acre parcels of land in Maine, using assumed names in the transactions. One parcel had shore frontage, a deep water dock, and access to the Atlantic Ocean. The inland tract had substantial warehouse facilities (Tr. 4, 20-22, 44-47, 217-218). Suspecting that the parcels

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[1] Petitioner Nissenbaum was not convicted of the substantive charge; he was convicted only on the conspiracy count. Petitioners Rush, Cohen, Collins, Brown, and Larry Lancelotti were convicted on both counts and received concurrent sentences.

had been purchased for use in drug smuggling, law enforcement agents began surveillance of the property. On the afternoon of October 19, 1980, twenty people gathered on the dock and appeared to be keeping watch on vessels approaching from the ocean. They had with them three inflatable Zodiac rubber boats.

At approximately midnight on October 19, 1980, the *Jubilee*, a 70-80 foot diesel engine shrimper, came into the bay without navigational lights, hugging the shore until it reached the dock (Tr. 206, 228, 229, 364). The three Zodiac boats were launched and tied up to the *Jubilee* (Tr. 230). People aboard the *Jubilee* began passing a series of bales to the Zodiacs, which ferried the bales to shore (Tr. 230, 364). At the dock, a human chain unloaded the bales onto the lawn and into nearby pickup trucks operating without lights (Tr. 231, 364).

Law enforcement agents maintaining surveillance watched this process being repeated for almost three hours (Tr. 231). At 3:00 a.m., a caravan of marked and unmarked police cars made its way to the property (Tr. 232, 275). When the officers announced that they were police, the people on the dock scattered in all directions, pursued by the agents (Tr. 234, 236, 365). Petitioners were arrested in various locations in the area during the next few hours. Some of the petitioners were arrested on board the *Jubilee*. During the ensuing investigation, the agents seized 1263 bales of marijuana, weighing a total of 21 tons (Tr. 400, 420).

ARGUMENT

1. Petitioners raise two speedy trial claims. First petitioners Harry and Jacob Shnurman contend that, under the Speedy Trial Act, they were entitled to a new 30-day defense-preparation period following their arraignment on the superseding indictment. Because they were tried on the day following that arraignment and had recently substituted new counsel, they argue that they were tried *too soon* under Section 3161(c)(2) of the Speedy Trial Act. In addition, all of the petitioners claim that their trial was impermissibly tardy under other provisions of the Speedy Trial Act. In the latter connection, petitioners argue that the courts below improperly excluded from their speedy trial calculations a period during which a government petition for rehearing was pending in the court of appeals. Neither of these Speedy Trial Act claims has merit, and the court of appeals correctly found that both the maximum and the minimum time limits of the Act were complied with here.

a. Petitioners Harry and Jacob Shnurman were originally indicted (along with all but one of the other petitioners) on October 24, 1980; they were arraigned on that indictment shortly thereafter. A superseding indictment was returned in February 4, 1981. It did not alter the charges against the Shnurmans; instead, it merely added petitioner Nissenbaum as a co-defendant. The Shnurmans requested that their arraignment on the superseding indictment be postponed until trial to minimize the travel expenses to be incurred by their Iowa-based counsel. Pursuant to their request, they were arraigned on December 6, 1982, the day before trial was scheduled to begin.

At the December 6 hearing, a new attorney was appointed to represent Jacob Shnurman. A new at-

torney had been retained to represent Harry Shnurman on December 3, 1982. Previously each of the Shnurmans had shared counsel with one or more of their co-defendants. On December 6, the Shurmans claimed a right to a 30-day continuance under Section 3161(c)(2) of the Speedy Trial Act, arguing that they were automatically entitled to a new 30-day preparation period following their arraignment on the superseding indictment. The district court did not agree that such a continuance was mandatory here, but it nevertheless offered the Shnurmans a one-week continuance to enable them to prepare for trial with their new attorneys. In the court's view, further delay was unnecessary because the case against the Shnurmans was simple and straightforward: Harry Shnurman was arrested on the shore near the dock where the bales of marijuana were being unloaded; Jacob Shnurman was rescued from the frigid waters while swimming away from the dock in an effort to avoid capture. The Shnurmans declined the court's offer of a one-week continuance.

The court of appeals rejected the Shnurmans' claim that they were automatically entitled to a 30-day continuance following their arraignment on the superseding indictment (Pet. App. 39-46). The court observed that the "statute does not explicitly provide for a new thirty-day period when the indictments overlap" (*id.* at 43). The court concluded that the return of a superseding indictment while the original indictment is outstanding does not trigger a new defense-preparation period "unless in a specific case this would deprive a defendant of adequate opportunity to prepare his defense" (*id.* at 44). Based on its review of the record, including the performance of counsel, the court found "without hesitation" that the

Shnurman's had "ample time for preparation" (*id.* at 45 & n.28). In this regard, the court noted that petitioners had refused the one-week continuance offered by the court and that they were responsible for both the delay in their arraignment and the last minute timing of the substitution of counsel. With respect to the latter point, the court observed that "the potential conflicts which made changes of counsel necessary were apparent long before trial" (*ibid.*).

Petitioners now concede (Pet. 15) that as a general rule a superseding indictment does not trigger a new defense-preparation period under Section 3161(c)(2).[2] They contend, however—apparently for the first time in any court (compare Pet. 15 with Pet. App. 39-46)—that they were entitled to a new statutory preparation period because they changed counsel on the eve of trial. In their view, Section 3161(c)(2) requires

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[2] Accordingly, they concede the correctness of the court of appeals' interpretation of Section 3161(c)(2), which is consistent with the position that the government has advanced in its petition in *United States* v. *Rojas-Contreras*, No. 84-1023, filed December 26, 1984. In *Rojas-Contreras*, the question presented is whether a defendant is automatically entitled to a new preparation period following the return of a superseding indictment that makes an immaterial alteration in the charge against that defendant. Because the Shnurmans agree that the correct answer to this question is negative, there is no reason to hold this case for disposition in light of *Rojas-Contreras*. Such action would in any event be inappropriate for two additional reasons that distinguish the cases. First, under any view of the Act, the Shnurmans waived any right to a new preparation period by deliberately postponing their arraignment until trial to save on attorney's fees. Second, the new indictment here did not in any respect alter the wording of the charges against them, but merely added an additional defendant (who did receive a 30-day trial preparation period).

a new preparation period following each change of counsel.

Even if this contention had been preserved for review, it would be unavailing. The statutory language provides no support for the Shnurmans' claims. Section 3161(c)(2) provides (emphasis added):

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant *first* appears through counsel or expressly waives counsel and elects to proceed pro se.

The language is unambiguous; a defendant "*first* appears through counsel" only once, whether or not he changes counsel at a later date. See *United States* v. *Darby*, 744 F.2d 1508, 1520 (11th Cir. 1984) (emphasis in original) ("When employing the term 'first' Congress presumably did not have *subsequent* appearances in mind.). And the rule proposed by petitioners would invite abuse by defendants, making possible indefinite postponement of trial, thereby defeating the overriding purpose of the Act.

Contrary to petitioners' contention (Pet. 14-16), *United States* v. *Campbell*, 706 F.2d 1138 (11th Cir. 1983), *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), and *United States* v. *Daly*, 716 F.2d 1499 (9th Cir. 1983), do not support their position. *Campbell* does not speak to the issue at all. The question there was whether the maximum time limit of the Act, rather than the minimum time limit, had been exceeded. Neither does *Harris* address the question. In *Harris* there was no substitution of counsel. Instead, the Ninth Circuit held that Harris was entitled to a new defense-preparation period because a superseding indictment had been returned. Because the

Shnurmans predicate their entitlement to a new 30-day period on the last minute change of counsel rather than on the return of the superseding indictment, *Harris* would not help them, even assuming it is correctly decided.[3]

Daly, by contrast, is pertinent here; it is clearly inconsistent with petitioners' contention, however. In *Daly* an attorney was appointed to represent defendant Klemp solely for the purpose of a bail hearing. A different attorney was appointed to represent Klemp at trial. The court of appeals held that the 30-day period ran from Klemp's first court appearance with trial counsel. 716 F.2d at 1504-1505. But in so ruling, the court made clear the narrowness of its holding (*id.* at 1505):

> We therefore hold that the 30-day period begins to run when an attorney appears on a defendant's behalf after the indictment or information has been filed, unless there is an indication that the attorney is appearing only for a limited purpose and will not further represent that defendant at trial. If the attorney has been appointed to represent the defendant only for a specific pre-arraignment purpose or at the time of his initial appearance or prior to the filing of the indictment or information disavows his intent to represent the defendant further, the period will not commence because the statutory purpose for the 30-day delay would not be fulfilled.

Under *Daly*, the Shnurmans were not entitled to a new 30-day period following substitution of counsel.

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[3] The Ninth Circuit's decision in *Rojas-Contreras*, which we have asked this Court to review, (see page 6 note 2, *supra*), rests on its prior decision in *Harris*.

Their original attorneys fully intended to represent them at trial and petitioners intended that they do so; original counsel did not appear solely for some limited purpose. The Shnurmans changed counsel on the eve of trial to avoid potential conflicts of interest that, as the court of appeals concluded (Pet. App. 45), had long been apparent. In the circumstances, there is no basis for the Shnurman petitioners' claim that they were entitled to additional preparation time.

b. All petitioners contend (Pet. 7-13) that trial commenced beyond the 70-day limit set forth in Section 3161(c)(1) of the Speedy Trial Act and, accordingly, that the indictment should have been dismissed. As petitioners acknowledge, the 70-day limit is subject to expansion by certain periods of excludable delay. 18 U.S.C. 3161(h). Petitioners claim, however, that the period during which a government rehearing petition was pending in the court of appeals should not have been excluded in computing the deadline for trial because the rehearing petition applied only to their co-defendant Clifton Middleton. There is no merit to this claim.

Ten of the original defendants in this case moved to dismiss the indictment on double jeopardy grounds. The district court granted the motion of one defendant, Middleton, and denied the motions of the remaining defendants. The government appealed from the order as to Middleton; the nine other defendants took an interlocutory appeal from the adverse rulings they had received. The appeals were argued together and both were decided on March 19, 1982. The district court's rulings as to both Middleton and the other defendants were affirmed. *United States* v. *Booth*, 673 F.2d 27; *United States* v. *Middleton*, 673 F.2d 31. The government filed a rehearing petition in

Middleton on May 3, 1982. The records in both *Booth* and *Middleton* were retained by the court of appeals until the *Middleton* rehearing petition was denied on August 10, 1982. The mandate in *Middleton* issued seven days later.

Thereafter, petitioners moved the district court to dismiss the indictment on statutory Speedy Trial Act grounds, claiming that the Speedy Trial Act "clock" was running on their cases after their own appeal was decided even though the government's rehearing petition was still pending in *Middleton*, and that the time for trial had expired. In addressing this claim (Pet. App. 33-37), the court of appeals found the entire period from the filing of the notices of appeal in *Booth* and *Middleton* through the issuance of the mandate in *Middleton* to be excludable. In reaching this result, the court of appeals relied on 18 U.S.C. 3161(h)(1), (h)(1)(E) and (h)(7). Subsection (h)(1)(E) excludes from calculation of the deadline for trial "delay resulting from any interlocutory appeal." Subsection (h)(7) makes applicable to all co-defendants any exclusion applicable to one defendant in a multi-defendant case, provided only that "no motion for severance has been granted." The court of appeals reasoned that until it had denied the government's rehearing petition in *Middleton*, Middleton did not cease to be a co-defendant in the case (Pet. App. 36-37).

The court of appeals' ruling was manifestly correct. Petitioners and Middleton were charged in a single indictment and would have been tried together but for the dismissal as to Middleton on double jeopardy grounds. That dismissal did not become final until the government exhausted its appellate remedies. Had the government prevailed on its rehearing petition,

there can be little doubt that Middleton would still have been a co-defendant in the case as to whom no severance had been granted. Accordingly, during the period in question, Middleton was still a defendant in the case and the government's rehearing petition suspended the time limits for all defendants. Cf. *United States* v. *McGrath*, 613 F.2d 361, 366 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980). Indeed, any other rule could have forced the district court to proceed with a trial while the rehearing petition was still pending as to Middleton, running the risk that the trial would have to be repeated as to Middleton.[4]

Petitioners also argue (Pet. 12) that, in any event, only 30 days of the period while the government's rehearing petition in *Middleton* was pending are to be excluded from computation of the 70-day deadline for trial and that the overage renders their trial untimely. Petitioners rely on 18 U.S.C. 3161(h)(1)(J) and on *United States* v. *Black*, 733 F.2d 349 (4th Cir. 1984). Neither supports petitioner's contention.

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[4] While it may have been possible, as petitioners suggest (Pet. 11), for the district court to obviate this dilemma by entering a discretionary "ends-of-justice" continuance under 18 U.S.C. 3161(h)(8), such an order was superfluous, as the court of appeals observed in denying petitioners' rehearing petition (Pet. App. 66), because the Speedy Trial Act provides for automatic exclusion of time in this situation. We note that requiring the district court to grant a continuance in this situation would not in any way serve the purposes of the Speedy Trial Act or protect defendants. Nor does recognizing an automatic exclusion, as the courts below did, strip the district court of discretion to grant a severance and proceed with trial while the rehearing petition as to another defendant is under submission. As the court of appeals observed (Pet. App. 36), petitioners made no effort to urge the district court to proceed in this fashion.

Section 3161(h)(1)(J) mandates exclusion from trial deadline computations of "any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." But the 30-day time limit established by Section 3161(h)(1)(J) generally does not apply to appellate proceedings.[5] Rather, separate provisions of the Act provide for exclusion of time consumed by appellate proceedings and proceedings in this Court. Thus, 18 U.S.C. 3161(h)(1)(E) provides for exclusion of the time attributable to any interlocutory appeal, without regard to the 30-day limit of Section 3161(h)(1)(J). And Section 3161(d)(2) provides that when an indictment is dismissed by the district court and reinstated following a government appeal "trial shall commence within seventy days from the date the action occasioning the trial becomes final."[6] Similarly Section 3161(e) generally allows

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[5] Petitioners' construction would put an entirely unmanageable burden on appellate courts, including this Court, since it would prohibit them from having an interlocutory appeal under advisement for more than 30 days, except at the cost of starting the speedy trial clock running. The result would be that, even if the government prevailed on an interlocutory appeal, the indictment would in most cases have to be dismissed under the Speedy Trial Act. Plainly Congress did not intend such results.

[6] The court of appeals appears to have assumed that the time during which the government's appeal in *Middleton* was pending was excludable under the *interlocutory* appeal provision, Section 3161(h)(1)(E). See page 10, *supra*. While this was a correct characterization of petitioners' appeals, the government's appeal was from a final order dismissing the indictment as to Middleton on double jeopardy grounds. In any event, Section 3161(d)(2) makes clear that the Speedy Trial Act clock had not run out as to Middleton until

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70 days for retrial following appellate reversal of a conviction. In other words, the Speedy Trial Act "clock" is effectively restarted at the beginning in either of these situations. Under any of these provisions the Speedy Trial Act clock is restarted only when all appellate remedies, including review sought in this Court, have been exhausted. See *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 4 n.4 (Brennan, J., dissenting); *United States* v. *Dunn*, 706 F.2d 153, 155 (5th Cir. 1983); cf. *United States* v. *Lyon*, 588 F.2d 581, 582 (8th Cir. 1978), cert. denied, 441 U.S. 910 (1979).[7] Thus the Speedy Trial Act does not limit the exclusion of time consumed by appellate proceedings to 30 days.

United States v. *Black*, *supra*, is not to the contrary. In *Black*, the defendant's conviction was re-

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the government's appeal was finally disposed of; accordingly, under Section 3161(h)(7), the continued pendency of *Middleton* required exclusion of time as to all petitioners.

[7] As the court of appeals observed (Pet. App. 35), when review is not sought in this Court, the issuance of the court of appeals' mandate usually restarts the Speedy Trial Act clock. Relying on this rule, petitioners urge (Pet. 9, 12) that the issuance of the mandate on their interlocutory appeals restarted the Speedy Trial Act clock. But as we have explained above, because the clock was not yet restarted for defendant Middleton, whose case had yet to be finally severed from those of the petitioners, the separate provisions of Section 3161(h)(7) require the exclusion of additional time. The cases cited by petitioners (Pet. 9, 12) for the proposition that the issuance of the mandate restarted the Speedy Trial Act clock simply do not address the situation created by joinder of multiple defendants whose appeals are not concluded at the same time. Accordingly, they do not conflict with the decision below.

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versed on appeal. 692 F.2d 314 (4th Cir. 1982). The government filed a petition for panel rehearing. The petition was denied, and the mandate issued. This latter event presumably started the 70-day retrial clock. See page 13 note 7, *supra*. Following issuance of the mandate, the government filed a motion with the court of appeals seeking leave to file out of time a second petition, this time suggesting rehearing en banc, and asking that the court recall its mandate and grant the petition. The court of appeals denied the government's motion 27 days later.[8] Thereafter, Black moved to dismiss the indictment alleging that his retrial did not commence within 70 days of the issuance of the mandate, and accordingly violated 18 U.S.C. 3161(e). The government argued that no violation had occurred because the period during which its motion was pending in the court of appeals should not be counted toward the 70-day retrial limit. The district court disagreed and dismissed the indictment. The government appealed, and the court of appeals reversed. 733 F.2d 349. Citing Section 3161(h)(1)(J), which allows for the exclusion of up to 30 days for proceedings under advisement, the court held that the 27 days during which the government's motion to file an untimely rehearing petition had been under advisement in the court of appeals should have been excluded.

As these facts show, *Black* is easily distinguished from the instant case. In *Black* the only question was whether the issuance of the court of appeals' mandate rendered the time during which the motion to

[8] The Fourth Circuit denied the motion to file the rehearing petition, rather than denying the rehearing petition itself. See 733 F.2d at 353 (Winter, C.J., dissenting). Compare page 15 note 9, *infra*.

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file the second rehearing petition was pending non-excludable. Answering that question in the negative, the court simply assumed that the exclusion attributable to the pendency of the motion was governed by Section 3161(h)(1)(J). Assuming arguendo the correctness of this assumption, it has no bearing here. There is no question here that the *Middleton* appeal remained pending in the court of appeals until the government's timely rehearing petition was denied; the mandate in *Middleton* did not issue until August 17, 1982.[9] Thus this case is controlled by the general rule that the entire course of appellate proceedings is excludable. By contrast, as the court of appeals observed (Pet. App. 66), *Black* deals only with the effect of filing of an untimely rehearing petition after the court of appeals has lost general appellate jurisdiction by issuing the mandate.

2. Petitioners next contend (Pet. 16-20) that the district court improperly precluded them from presenting a First Amendment defense under the Free Exercise Clause—namely, that their possession of 21 tons of marijuana was constitutionally protected because use of marijuana is a rite of the Ethiopian Zion

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[9] Petitioners allege (Pet. 9) that the government's rehearing petition in *Middleton* was untimely. The government had been granted a 30-day extension of rehearing time. That extension on its face expired on Sunday, May 2, 1982, when the clerk's office was closed, and the petition was filed the next day when it reopened. Under Fed. R. App. P. 26(a) the petition was timely filed. In any event, the court accepted the petition for filing and the petition was ultimately denied three months later (rather than being dismissed or returned). As a result, the mandate in *Middleton* did not issue until after the rehearing petition was denied.

Coptic Church, to which they claim to belong.[10] The court below correctly rejected this claim as without merit, recognizing that the proffered defense was insufficient in law (Pet. App. 46-52).

This Court has long recognized that not all burdens on religion are constitutionally impermissible. See *United States* v. *Lee*, 455 U.S. 252, 257 (1982); *Davis* v. *Beason*, 133 U.S. 333, 345 (1890) ("Crime is not the less odious because sanctioned by what any particular sect may designate as religion."). The court below correctly applied (Pet. App. 50-52) the balancing test set forth in *Lee* and concluded that "[n]o broad religious exemption from the marijuana laws is constitutionally required" (*id.* at 52).

Indeed, the courts have uniformly held that Congress may constitutionally control the use, even for religious purposes, of drugs that it determines to be dangerous. *United States* v. *Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); *Leary* v. *United States*, 383 F.2d 851 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969). See also *Native American Church* v. *United States*, 468 F. Supp. 1247, 1249 (S.D.N.Y. 1979), aff'd, 633 F.2d 205 (2d Cir. 1980); *United States* v. *Hudson*, 431 F.2d 468 (5th Cir. 1970), cert. denied, 400 U.S. 1011 (1971); *Randall* v. *Wyrick*, 441 F. Supp. 312 (W.D. Mo. 1977); *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968). In *Leary*, the Fifth Circuit carefully considered the legality of drug use as part of religious practice in light of the decisions of this Court. The court there held that the govern-

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[10] Petitioner Charles Leaton is not entitled to raise this issue because he indicated prior to trial that he was not going to rely on the First Amendment defense (see Pet. App. 19, n.20).

ment had both the power and the duty to control the use of marijuana. It also observed that the paramount governmental interest in protecting society overrode any interest—even if religiously motivated—that the defendant might have had in unrestricted drug usage. 383 F.2d at 860. See also *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *Reynolds* v. *United States*, 98 U.S. 145 (1878).[11]

3. Petitioners finally contend (Pet. 20-22) that the district court should have severed the defendants into two groups: those who planned to present no defense and those who claimed, citing *United States* v. *Swiderski*, 548 F.2d 445, 450-451 (2d Cir. 1977), that they jointly possessed the 21 tons of marijuana for their own (religious) use and had no intent to distribute

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[11] Nor is there merit to petitioners' claim (Pet. 20) that they must be allowed to use marijuana because the Native American Church has special dispensation for sacramental use of peyote. As the court of appeals observed (Pet. App. 52-53), petitioners' equal protection claim fails because marijuana is not covered by the peyote exemption, and because

> the peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act, which declares a federal policy of "protect(ing) and preserv(ing) for American Indians the(ir) traditional religions . . ., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996.

The court observed that peyote usage by American Indians was contemplated by the legislative history of 42 U.S.C. 1996. Petitioners point to no similar congressional findings that would warrant like treatment for the Ethiopian Zion Coptic Church.

it.[12] The courts below correctly held (see Pet. App. 54-61) that petitioners were not entitled to a severance because the defenses presented were not irreconcilable. The defendants who admitted possession while disavowing any intent to distribute the marijuana did not implicate their silent co-defendants in the offense. On the contrary, the government was still required to connect each of the nontestifying defendants to the marijuana that was being unloaded from the *Jubilee*. And in no sense did the silent defendants incriminate the defendants who testified. The jury could not infer from some defendants' silence that other defendants were lying about their intention to retain the marijuana for personal use.

Moreover, as the court of appeals noted (Pet. App. 61), the district court instructed the jury to " 'consider the evidence as to each count separately and separately with respect to each defendant.' " And the verdict demonstrates that the jury was able to treat each defendant individually. The jury acquitted one defendant on both counts and convicted five petitioners on both counts. Of the remaining petitioners, one was convicted only on Count I; the others were convicted only on Count II. Accordingly, petitioners were not prejudiced by their joint trial.

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[12] Like the court of appeals (Pet. App. 56-57), we doubt that the latter was a viable defense given the record of this case. The massive quantity of marijuana involved here—21 tons—itself refutes any claim of possession for personal use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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